Kekatong Sdn Bhd v Bumiputra-Commerce Bank Bhd & Anor

HIGH COURT (KUALA LUMPUR) — GUAMAN SIVIL NO S6-22-85 OF 2002

AZMEL J

11 MAY 2002

Civil Procedure *— Injunction — Interlocutory injunction — Interlocutory injunction against wholly owned subsidiary of Pengurusan Danaharta Nasional Bhd — Whether Limitation Act 1953 may override provisions of Pengurusan Danaharta Nasional Act 1998 in respect of laws on limitation — Whether court had power to entertain plaintiff's application in the light of s 72 of the Pengurusan Danaharta Nasional Bhd Act 1998 — Pengurusan Danaharta Nasional Bhd Act 1998 ss 14(4)(k), 57(1), 72*

Statutory Interpretation *— Construction, rules of — Prevalence of specific over general provisions — Prevalence of later over earlier provisions — Whether Limitation Act 1953 may override provisions of Pengurusan Danaharta Nasional Act 1998 — Pengurusan Danaharta Nasional Bhd Act 1998, ss 14(4)(k), 57(1)*

The plaintiff in this case had provided security by way of a third party charge over certain lands ('the said charged lands') in favour of Bank Bumiputra Malaysia Bhd ('the bank'), the predecessor of the first defendant, for a loan granted by the bank to one Kredin Sdn Bhd ('Kredin'). Because Kredin defaulted in repayment of the loan, judgment was entered in favour of the bank against Kredin in April 1996. Subsequently, through foreclosure proceedings, an order for sale of the said charged lands was obtained, but was eventually set aside by the Court of Appeal some 12 years later on the ground that no proper or effective service of demand was made by the bank to the plaintiff prior to the commencement of the foreclosure proceedings. The bank then proceeded in October 1998 to issue a notice of demand against the plaintiff for the sum due under the loan. On 7 May 1999, the second defendant, a wholly owned subsidiary of Pengurusan Danaharta Nasional Bhd, acquired from the bank, by way of statutory vesting, the loan and charge pursuant to the provisions of the Pengurusan Danaharta Nasional Bhd Act 1998 ('the Act') and became vested with the rights and remedies originally vested in the bank under the loan agreement and the charge against the plaintiff. The plaintiff applied for an interlocutory injunction to restrain the second defendant from exercising its rights under the Act or pursuant to the vesting order dated 7 May 1999 in respect of charges on the said charged lands, placing sole reliance on the contention that the subsequent actions filed by the bank in October 1998 should be barred by limitation by virtue of the provisions of the Limitation Act 1953. Besides the plaintiff's contention, the court also addressed the issue of whether it had the power to entertain the plaintiff's application for an injunction in the light of s 72 of the Act.

Held, dismissing the plaintiff's application:

(1) The court had no power to entertain the plaintiff's application for an injunction. On the clear provisions of s 72 of the Act, the power of the court to issue any order of injunction against the second defendant, being a wholly owned subsidiary of Danaharta, had been taken away (see p 190E–F).

(2) The Limitation Act 1953 cannot override the provisions of the Act in respect of the laws on limitation. From the wordings of ss 14(4)(k) and 57(1) of the Act, it is clearly the intention of the legislature to enact the Act to allow its application to override the provisions of the Limitation Act 1953. Whilst there exists a conflict between the provisions of the Limitation Act 1953 and ss 14(4)(k) and 57(1) of the Act in respect of the limitation laws, ss 14(4)(k) and 57(1) of the Act will prevail over the Limitation Act 1953 for the following reasons: (i) ss 14(4)(k) and 57(1) of the Act are specific, whereas the provisions of the Limitation Act 1953 are general in nature; and (ii) the Act came into effect very much later than the coming into force of the Limitation Act 1953 (see p 191D–H).

[Bahasa Malaysia summary

Plaintif dalam kes ini telah memperuntukkan jaminan melalui satu gadaian pihak ketiga ke atas beberapa bidang tanah ('tanah-tanah yang digadaikan tersebut') menyebelahi Bank Bumiputra Malaysia Bhd ('bank tersebut'), pendulu defendan pertama, untuk satu pinjaman yang diberikan oleh bank tersebut kepada Kredin Sdn Bhd ('Kredin'). Oleh kerana Kredin telah gagal untuk membayar balik pinjaman tersebut, penghakiman telah dimasuki menyebelahi bank tersebut terhadap Kredin dalam bulan April 1996. Berikutan itu, melalui prosiding halang tebus, satu perintah jualan tanah-tanah yang digadaikan tersebut telah diperolehi, tetapi kemudiannya telah diketepikan oleh Mahkamah Rayuan lebih kurang 12 tahun kemudian atas alasan bahawa tiadak penyampaian tuntutan yang betul atau berkesan telah dibuat oleh bank tersebut kepada plaintif sebelum prosiding halang tebus tersebut bermula. Bank tersebut kemudiannya pada bulan October 1998 mengeluarkan satu notis tuntutan terhadap plaintif bagi jumlah yang patut dibayar di bawah pinjaman tersebut. Pada 7 Mei 1999, defendan kedua, sebuah syarikat subsidiari milik sepenuhnya Pengurusan Danaharta Nasional Bhd, telah memperoleh daripada bank tersebut, melalui kuasa yang diberikan oleh statut, pinjaman dan gadaian tersebut menurut peruntukan-peruntukan Akta Pengurusan Danaharta Nasional Bhd 1998 ('Akta tersebut') dan diberikan hak-hak dan remedi-remedi yang pada mulanya terletak hak kepada bank tersebut di bawah perjanjian pinjaman dan gadaian terhadap plaintif. Plaintif telah memohon untuk satu injunksi interlokutori bagi menyekat defendan kedua daripada menggunakan hak-haknya di bawah Akta tersebut atau menurut perintah yang

memberi kuasa bertarikh 7 Mei 1999 berhubung gadaian ke atas tanah-tanah yang digadaikan tersebut, dengan meletakkan kebergantingan sepenuhnya atas pendapat bahawa tindakan-tindakan berikutnya yang difailkan oleh bank tersebut dalam bulan Oktober 1998 sepatutnya dihalang oleh had masa menurut Akta Had Masa 1953. Selain daripada pendapat plaintif, mahkamah juga mengemukakan persoalan tentang sama ada ia mempunyai kuasa untuk melayan permohonan plaintif untuk satu injunksi berdasarkan s 72 Akta tersebut.

Diputuskan, menolak permohonan plaintif tersebut:

(1) Mahkamah tidak mempunyai kuasa untuk melayan permohonan plaintif untuk satu injunksi. Berdasarkan peruntukan s 72 Akta tersebut yang jelas, kuasa mahkamah untuk mengeluarkan apa-apa perintah terhadap defendan kedua, yang merupakan milikan subsidiari Danaharta sepenuhnya, telah dirampas (lihat ms 190E–F).

(2) Akta Had Masa 1953 tidak menolak peruntukan-peruntukan Akta tersebut berhubung undang-undang tentang had masa. Berdasarkan perkataan-perkataan ss 14(4)(k) dan 57(1) Akta tersebut, adalah jelas hasrat badan perundangan menggubal Akta tersebut adalah untuk membenarkan permohonannya untuk menolak peruntukan-peruntukan Akta Had Masa 1953. Sementara terdapat satu konflik antara peruntukan-peruntukan Akta tersebut dan ss 14(4)(k) dan 57(1) Akta tersebut berhubung undang-undang had masa, ss 14(4)(k) dan 57(1) Akta tersebut mengatasi Akta Had Masa 1953 oleh sebab-sebab berikut: (i) ss 14(4)(k) dan 57(1) Akta tersebut adalah spesifik, sementara peruntukan-peruntukan Akta Had Masa 1953 adalah bersifat umum; dan (ii) Akta tersebut mula berkuatkuasa hanya selepas Akta Had Masa 1953 mula berkuatkuasa (lihat ms 191D–H).]

Notes

For cases on interlocutory injunction generally, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 2707–2794.

Legislation referred to

Limitation Act 1953
National Land Code 1965 Form 16D
Pengurusan Danaharta Nasional Bhd Act 1998 ss 14(4)(k), 57, 60, 72

Bastian Vendargon (*T Gunaseelan* with him) (*Jayaraman Ong & Co*) for the plaintiff.

Tommy Thomas (*Tommy Thomas & Co*) for the second defendant.

Azmel J: Under encl 12, the plaintiff in this case applied for an interlocutory injunction to restrain the second defendant from exercising its rights under the Pengurusan Danaharta Nasional Bhd Act 1998 ('the Act') or pursuant to the vesting order dated 7 May 1999 in respect of the charges on lands held under Lots No 267, 268, 269 and 271 under Grant No G19450, G19451, G19452 and G19453 in the Mukim and District of Kuala Lumpur ('the said charged lands').

The background of this case is as follows. On 28 May 1983, Bank Bumiputra Malaysia Bhd ('the bank'), the predecessor of the first defendant, granted a loan amounting to RM30m (in US dollar equivalent) to one Kredin Sdn Bhd ('Kredin') on security by a third party charge created by Kekatong Sdn Bhd over the said charged lands in favour of the bank. Because Kredin had committed default in repayment of the loan, judgment was entered in favour of the bank against Kredin on 1 April 1996 for the principal sum of US$17,771,319.06 together with interest thereon, vide Kuala Lumpur Civil Suit No S23–436–86.

Around the same time, the bank also commenced foreclosure proceedings against the plaintiff. On 7 September 1986 an order for sale was granted by the High Court against the plaintiff for the sale of the said charged lands. The plaintiff filed an appeal to the Court of Appeal. Almost 12 years later, on 9 March 1998, the Court of Appeal gave an order setting aside the order for sale granted by the High Court on the sole ground that no proper or effective service of demand was made by the bank to the plaintiff prior to the commencement of the foreclosure proceedings in the High Court. Consequent to the order of the Court of Appeal, on 13 October 1998, the bank issued a notice in Form 16D of the National Land Code 1965 against the plaintiff demanding payment of the sum of US$57,790,482.20, which represented Kredin's indebtedness to the bank as at 30 April 1998.

On 7 May 1999, the second defendant acquired from the bank by way of statutory vesting the loan and charge pursuant to the provisions of the Act. The vesting certificate was issued on 31 July 1999 and lodged with the registrar of companies on 4 August 1999.

The judgment against Kredin granted by the High Court on 1 April 1986 confirms the indebtedness of Kredin to the bank. Pursuant to cll 2 and 15 of the charges, the plaintiff is deemed to have agreed to pay the bank the indebtedness of Kredin upon demand being made on the plaintiff on 13 October 1998.

On the basis of the facts as stated above and by virtue of the provisions of the Act, the rights and remedies originally vested in the bank under the loan agreement and the charge against the plaintiff were, on 7 May 1999, vested in the second defendant. Such being the circumstances, the position of the first defendant in this action has become dormant and literally inactive as its powers have been taken over by the second defendant.

Before me, the plaintiff sought for an order of interlocutory injunction to restrain the second defendant from exercising its rights under the Act or pursuant to the vesting certificate dated 7 May 1999 in respect of the charge

of the said charged lands. It is not disputed that the second defendant is a wholly owned subsidiary of Pengurusan Danaharta Nasional Bhd and by virtue of s 60 of the Act the second defendant also enjoys all the rights as enjoyed by the parent company under the Act, including the provisions of s 72 of the Act.

In my view, before I deal with the merits of the plaintiff's application, it is essential for me to consider the applicability and relevance of s 72 of the Act vis-à-vis the plaintiff's application. It reads as follows:

> Limits on the grant of orders of court.
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> Notwithstanding any law, an order of court cannot be granted:
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> (a) which stays, restrains or affects the powers of the Corporation, Oversight Committee, Special Administrator or Independent Advisor under the Act;
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> (b) which stays, restrains of affects any action taken, or proposed to be taken, by the Corporation, Oversight Committee, Special Administrator or Independent Advisor under this Act;
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> (c) which compels this Corporation, Oversight Committee, Special Administrator, or Independent Advisor to do or perform any act;
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> and any such order, if granted shall be void and unenforceable and shall not be the subject of any process of execution whether for the purpose of compelling obedience of the order or otherwise.

Section 72 of the Act came into force on 1 September 2000. The wordings of s 72 of the Act are very clear and contain no ambiguity as to its meaning and intention. In the absence of any ambiguity, it is incumbent upon this court to give it its literal meaning. On the clear provisions of s 72 of the Act, the power of this court to issue any order of injunction against Pengurusan Danaharta Nasional Bhd which includes the second defendant, being a wholly owned subsidiary of Danaharta, is taken away. It therefore means this court has no power to entertain the plaintiff's application for an injunction. On this ground alone the plaintiff's application must fail.

Notwithstanding my decision on the lack of power of this court to grant an injunction against Danaharta, I have also proceeded to consider the issue on the law of limitation on which ground the plaintiff's case relied heavily. It was contended by the plaintiff that the order of sale that was granted by the High Court dated 7 September 1986 against the plaintiff for the sale of the said charged lands had been overturned by the Court of Appeal on 9 March 1998. The plaintiff therefore argued that the subsequent actions filed by the bank on 13 October 1998 against the plaintiff should be barred by limitation by virtue of the provisions of the Limitation Act 1953.

As I have already mentioned above, by virtue of the vesting certificate the rights and remedies formerly vested with the bank under the loan agreement and charge against the plaintiff are now vested in the second defendant with effect from 7 May 1999. That being the situation, the issue that needs to be determined now is whether the provisions of the Limitation Act 1953 can be invoked against the second defendant. In other words, the question to be decided is whether the Limitation Act 1953 can override the provisions of the Act in respect of the laws on limitation. This requires the

examination of the relevant provisions of the Act. The first relevant provision is s 14(4)(k) of the Act. It states as follows:

> (4) Without prejudice to sub-s (1), (2) or (3) in relation to an asset vested in the Corporation:
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> (k) *no provision in any law or agreement limiting or prohibiting the right of the seller or requiring any consent to assign, sell, dispose or transfer such asset shall have any application or effect in respect of any acquisition or disposition by the Corporation,* except that a disposition of such asset by the Corporation shall be subject to the approval of the relevant regulatory body or relevant State Authority having jurisdiction over such disposition. (Emphasis added).

Section 57 of the Act also provides as follows:

> (1) Notwithstanding any other law and in addition to any other power of the corporation may have under any contract or any other law, the Corporation or the acquiree as holder of any security whether as chargee, mortgagee, assignee lieu-holder or otherwise, over any property shall be entitled:
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> (a) to dispose of such property or any part of such property by way of private treaty.

In my view, from the wordings of s 14(4)(k) and also s 57(1) of the Act, it is clearly the intention of the legislature to enact the Act to allow its application to override the provisions of existing laws including the Limitation Act 1953.

Needless to say, there exists a conflict between the provisions of the Limitation Act 1953 and the provisions of the Act in respect of limitation laws. In light of such conflict, can it be argued that the provisions of the Limitation Act 1953 can prevail over the provisions of the Act? In my considered opinion it cannot be done. Under the circumstances, the provisions of the Act will prevail over the Limitation Act 1953. My reasons are as follows.

Firstly, according to the rules of construction, where there exist two provisions of written law in conflict with each other, one general and the other specific, then the specific or special provision excludes the operation of the general provision. The relevant provisions of the Act are specific whereas the provisions of the Limitation Act 1953 are general in nature.

Secondly, in case of conflict between two written laws, the one which came into effect later will override the earlier law. The Limitation Act came into effect in 1953 whereas the Act came into force in 1998.

In the light of the above reasons, I rule that the provisions of the Act prevail over the provisions of the Limitation Act 1953 since the provisions of the Act are specific provisions and also the Act came into effect very much later than the coming into force of the Limitation Act 1953.

Therefore, since the action of the second defendant cannot be subjected to the provisions of the Limitation Act 1953 on which ground the plaintiff had put sole reliance, it is my conclusion that the plaintiff's chance of success in this application would be very slim.

In the light of the above circumstances, I therefore ruled that the plaintiff's application be dismissed with costs. A

Plaintiff's application dismissed.

Reported by Joel Ng

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